

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

In re:)
)
VON LESTER TAYLOR,)
)
Plaintiff,)
)
vs.) Case No. 2:07-CV-00194
)
SCOTT CROWTHER, et al,)
)
Defendants.)
)
)
_____)

BEFORE THE HONORABLE DUSTIN PEAD

October 5, 2017

Transcript of Electronically Recorded Motion Hearing

Laura W. Robinson, RPR, FCRR, CSR, CP
351 South West Temple
8.430 U.S. Courthouse
Salt Lake City, Utah 84101
(801) 328-4800

Appearances of Counsel:

For the Petitioner: Brian M. Pomerantz
Attorney at Law
6351 Owensmouth Avenue
Suite 203
Woodland Hills, California 91367

Ken Murray
Attorney at Law
316 E. Mitchell Drive
Phoenix, Arizona 85012

For the Respondents: Erin Riley
Andrew F. Peterson
Attorneys at Law
Utah Attorney General's Office
160 East 300 South
Sixth Floor
Salt Lake City, Utah 84114

1 **Salt Lake City, Utah October 5, 2017**

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3 THE COURT: Good afternoon, everyone. My name is
4 Dustin Pead, a magistrate judge, referral judge,
5 2:07-CV-194, *Taylor versus Crowther*.

6 Would counsel please make their appearance?
7 Mr. Pomerantz starting with you as petitioner.

8 MR. POMERANTZ: Good afternoon, Your Honor, Brian
9 Pomerantz on behalf of petitioner Von Taylor.

10 MR. MURRAY: And Ken Murray as well, Your Honor.

11 THE COURT: Thank you, gentlemen. And for the state.

12 MS. RILEY: Erin Riley and Andrew Peterson from the
13 Attorney General's Office for the respondent.

14 THE COURT: Thank you. Ms. Riley, are you going to
15 speak today?

16 MS. RILEY: I am, yes.

17 THE COURT: I want to first, before we address the
18 motion to continue, indicate that I have had an opportunity
19 to communicate with Mr. Pomerantz and Mr. Murray about some
20 issues I would like to ask Mr. Pomerantz to state how he
21 views the current motion and any requests he might make in
22 this regard. Mr. Pomerantz?

23 MR. POMERANTZ: We are requesting that the motion to
24 continue be stayed on consideration until Monday, and that
25 the discovery deadlines be moved back to Wednesday, if

1 necessary.

2 THE COURT: Um, Mr. Pomerantz, is it fair to say that
3 you're still -- you're -- it's a fluid motion, you're
4 considering whether you can go forward in earnestness with
5 the already existing evidentiary hearing set for November.

6 MR. POMERANTZ: We are.

7 THE COURT: And Ms. Riley, they're saying look, we may
8 need just a few more days to examine some situations that
9 are going on to see how we want to move forward. It would
10 require, if I adopt their proposal, pushing some dates. It
11 would be pushing the things that are due on Friday and
12 Saturday to next Wednesday, and then they would have to
13 alert me and you by close of business on Monday whether they
14 want to move forward in earnestness with the motion to
15 continue. That's --

16 MS. RILEY: So would we not be arguing anything about
17 the motion to continue today?

18 THE COURT: Right.

19 MS. RILEY: I guess I'm not clear why one more day
20 would change things about that.

21 THE COURT: Well, I don't want to speak for
22 Mr. Pomerantz. All I'm saying is that it's a fluid
23 situation and they're trying to balance competing interests
24 versus going forward with the hearing versus the ability to
25 move forward with what they have. Mr. Pomerantz, would you

1 like to add anything to the record in that regard?

2 MR. POMERANTZ: We are trying to assess, based on the
3 information we have, whether the continuance is necessary or
4 not and we have not had time to digest all of the
5 information that we received over the last two days in the
6 deposition yet. So we're looking for time to digest that
7 information to figure out whether it is necessary for us to
8 continue this hearing or not.

9 THE COURT: My stated preference was that we could
10 address this while they were in town so we could have an
11 opportunity to go on a back and forth rather than a
12 telephonic hearing. But I also have some interest in moving
13 forward with the evidentiary hearing at least for Judge
14 Campbell if we can do that. Um, so I think they tried to
15 balance the desire from my end to make sure that we're
16 addressing any motion to continue as quickly as possible,
17 but I don't want to prematurely conclude that it should or
18 must be continued unless they believe that it should. And
19 they're indicating that they would like a little more time
20 to do that.

21 MS. RILEY: Um, I guess I have two concerns, Your
22 Honor. First is we are opposing the motion to continue in
23 general at all and so our position is that we would prefer
24 to go ahead and argue and argue why it shouldn't be granted
25 no matter what, you know, whatever they come up with.

1 And then the second thing is, um, if it is stayed
2 until Monday, is that then going to be a telephonic argument
3 are you saying?

4 THE COURT: Yes, it would be set on Tuesday for
5 telephonic.

6 MS. RILEY: So I, you know, I understand this is
7 totally up to the court and at your discretion. Our
8 position is we would prefer to go ahead and argue today and
9 argue our position that there is not a basis for the
10 continuance at all. Um, that would be our preference.

11 THE COURT: I think that is a very reasonable
12 position. I'm going to go ahead and hold that decision in
13 abeyance. We'll set it over. I'm going to ask you to alert
14 the court and Ms. Riley and Mr. Peterson by no later than
15 4:00 p.m. mountain time in terms of whether you are moving
16 forward with the motion to continue in earnest.

17 If there is a determination that the motion they want
18 to proceed with the motion, we will do our very best to
19 reach out to you all immediately and try to get a hearing
20 set for Tuesday. I'll be conducting that hearing and we
21 will go from there.

22 Meanwhile, there are deadlines for things that need to
23 be turned over, motions in limine, exhibit and witness lists
24 are due on Saturday, I believe. Is that correct,
25 Mr. Pomerantz?

1 MR. POMERANTZ: Motions in limine are due tomorrow,
2 the exhibit and witness lists are due on Saturday, Your
3 Honor.

4 THE COURT: What else is due over the weekend,
5 Ms. Riley? Is there anything else?

6 MS. RILEY: Transcripts of prior depositions that any
7 party might anticipate presenting.

8 MR. POMERANTZ: She is correct, Your Honor,
9 designation of transcripts.

10 THE COURT: And what I would like to do is we're going
11 to set all of those in abeyance and those will be -- the
12 deadlines for those will all be collectively on Wednesday,
13 close of business by Wednesday. Of course, that's subject
14 to (A) whether they want to move forward on a motion to
15 continue, and (B) whether it is granted.

16 Assuming they do not want to move forward, or I deny
17 the motion to continue, that will be the new date for those
18 matters to be turned over.

19 Mr. Pomerantz, anything else we need to address? The
20 is one other matter. Mr. Pomerantz, why don't you go ahead
21 and address the second matter as best you can, please.

22 MR. POMERANTZ: We are -- we would like to, Your
23 Honor, withdraw Mr. Wong's expert report and redesignate him
24 as a consultant rather than as an expert witness.

25 THE COURT: So, Ms. Riley, um, there is a notice that

1 Mr. Pomerantz is making at this point. I am not prepared to
2 discuss in detail some of the issues relating to that
3 designation -- re-designation but they're withdrawing the
4 report and considering him as a consultant, non-expert.

5 MS. RILEY: And that is, of course, a problem for us
6 because our experts are rebuttal witnesses and so part of
7 what they have done -- they have done is look at their
8 expert's reports when they proceed with their reports.

9 MR. PETERSON: They have to designate new experts --

10 MS. RILEY: Right. So it's almost like we're going to
11 be starting all over. If they're going to be designating a
12 new expert, then our experts are going to have to be looking
13 at it again.

14 THE COURT: Well, I guess that's the whole point. We
15 don't know if they're designating new experts or seeking to
16 designate new experts. That's the whole basis for holding
17 the motion to continue in abeyance. So believe me I read
18 you loud and clear this -- this is some potential problems.
19 That's why on balance I would rather we wait until Monday,
20 see what they want to do in earnestness and then we will
21 have to go forward from there.

22 MS. RILEY: Will you be filing a written motion to
23 withdraw his -- withdraw him as an expert?

24 THE COURT: Do you think that would be necessary?

25 MS. RILEY: Well, I guess I'm not sure what they're

1 anticipating by only calling him as a consultant. Does that
2 then anticipate --

3 THE COURT: He is not then being called.

4 MS. RILEY: That our expert can't refer to or discuss
5 or mention Mr. Wong's report? I mean I have some questions
6 about what that means.

7 THE COURT: Mr. Pomerantz, is it fair to say the
8 report is not going to be used at all by Mr. Taylor nor is
9 he going to be called as a witness in the proceeding. Fair
10 enough?

11 MR. POMERANTZ: Give me one moment, Your Honor.

12 THE COURT: Yes.

13 MR. POMERANTZ: Um, correct, Your Honor. We would not
14 be presenting the report, we would not be referring to the
15 report in the hearing and Mr. Wong would not be testifying
16 at the hearing. That's the purpose of, as you said,
17 re-designating him as a consultant. He will not appear at
18 the hearing at all.

19 THE COURT: So in terms of the rebuttal to Dr. Wong
20 there is just no utility for it, the report is no longer
21 part of the record in the hearing.

22 MS. RILEY: Right. My concern is that by doing this
23 today, withdrawing Mr. Wong's report, then they're putting
24 themselves in a position where there is no expert. And I
25 assume if they choose to go forward with the motion to

1 continue the evidentiary hearing they're going to cite that
2 as a basis for why they need a continuance. It seems to me
3 that they're, you know, that that is an issue there. If we
4 go forward with the evidentiary hearing then they have no
5 firearms ballistic report or expert at all.

6 THE COURT: That's correct, um, and I am going to have
7 to balance all of those things when we get to -- if we get
8 to a motion to continue and um -- um, there are some matters
9 that the court is not prepared to discuss that have impacted
10 that decision here today which I'm not going to address, but
11 it puts you in an awfully difficult position I understand
12 everyone where you're coming from, but I think this is the
13 best way to move forward amongst a lot of imperfect options.

14 So that's about as specific as I'm willing to get and
15 I know that's not much. So let's hold it in abeyance until
16 Monday and then we will move quickly from there.

17 Mr. Pomerantz, anything else from you?

18 MR. POMERANTZ: No, Your Honor. Thank you for your
19 time.

20 THE COURT: Ms. Riley, anything else from you?

21 MS. RILEY: Nothing today. Thank you, Your Honor.

22 THE COURT: Thank you. The hearing is concluded.

23 (Whereupon, the hearing concluded.)
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REPORTER'S CERTIFICATION

I hereby certify that the foregoing transcript was taken from a tape recording stenographically to the best of my ability to hear and understand said tape recording, that my said stenographic notes were thereafter transcribed into typewriting at my direction.

Dated this 21st of November, 2017.

Laura W. Robinson